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# in the Supreme Court of the United States

**OCTOBER TERM, 1973**

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## CASE NO. A-1190

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JOSEPH G. SCATA,

*Petitioner,*

*vs.*

UNITED STATES OF AMERICA,

*Respondent.*

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**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

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Petitioner, JOSEPH G. SCATA, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered on April 19, 1974, re-hearing denied May 28, 1974.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit entered April 19, 1974, not yet reported, appears in the Appendix hereto as Appendix "A". Denial of re-hearing entered May 28, 1974, appears as Appendix "B". Order of this Court denying Motion for Stay of Mandate on June 14, 1974 appears as Appendix "C". Further denial of Motion for Stay on Mandate appears as Exhibit "D". Adjudication of guilt and sentence entered by the United States District Court for the Southern District of Florida on December 20, 1972, appears as Appendix "E". A copy of the charge appears as Appendix "F".

## JURISDICTION

The opinion of the United States Court of Appeals for the Fifth Circuit was entered on April 19, 1974. A timely petition for rehearing was denied on May 28, 1974. This Petition for Writ of Certiorari was filed within thirty (30) days from that date.

This Court's jurisdiction is invoked under 28 United States Code, Section 1254(1).

## QUESTION PRESENTED

THE POSSIBILITY OF AN INFERENCE OF AGREEMENT TO CONSPIRE IS NOT A PROPER OR LEGAL GUIDELINE TO FOLLOW TO PERMIT CONVICTION OF CONSPIRACY OR TO PERMIT CONVICTION OF AIDING AND ABETTING.

## CONSTITUTIONAL PROVISION INVOLVED

### Amendment V

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

## STATUTORY PROVISIONS INVOLVED

### Title 18 U.S.C., Section 371

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000, or imprisoned not more than five years, or both."

### Title 18 U.S.C., Section 1341

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtain-

ing money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

**Title 18 U.S.C., Section 1343**

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communcation in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

**Title 18 U.S.C., Section 2**

"(a) Whoever commits an offense against the United States or aids, abets, counsels, induces or procures its commission, is punishable as a principal."

## HISTORY OF THE CASE

On August 8, 1972, an indictment was returned against Defendant, JOSEPH G. SCATA. In Count One Defendant and others were charged with devising a scheme to obtain money and property by false representations to suppliers in order to purchase on credit, merchandise and property knowing and intending that payment was not to be made. It was alleged that Defendant and William E. Owens, Jr., purchased Porter Hardware Inc., a retail hardware store. Other Defendants were charged with acting as agents of Porter Hardware pursuant to the instructions of Defendant SCATA. Agents of the hardware store used fictitious names and falsely represented the type and scope of the business. The agents allegedly utilized the previously established good credit of Porter Hardware as inducement. The agents issued checks and promissory notes which they did not intend to pay when presented. It was further charged that Defendant and others retained the merchandise for their benefit. Defendant received and used credit cards in the name of Porter Hardware knowing that payment would not be made. These acts were charged as a violation of Title 18 U.S.C., Sections 1341 and 2. Counts two through nine alleged that Defendant SCATA and others used the United States Mails for the purpose of executing the scheme in violation of Title 18 U.S.C., Sections 1341 and 2. Defendant SCATA was not charged in

Counts ten and eleven. In Counts twelve through fourteen Defendant SCATA was charged with using wire communications for the purpose of executing the scheme in violation of Title 18 U.S.C., Sections 1343 and 2. In Count fifteen Defendant SCATA was charged with conspiring together with other defendants to commit the substantive offenses stated in Counts one through fourteen (R. 1-21). A plea of not guilty was entered on August 11, 1972, (R. 29-31).

The jury returned a verdict of "guilty" as to Defendant SCATA with respect to Counts 2, 4, 5, 7, 8 and 15 (R. 239). He was sentenced (R. 343) to serve four years imprisonment as to each of Counts 2, 4, 5, 7, 8 and 12, to run concurrently and to imprisonment for two years as to Count 15, to run consecutive to the other counts.

Appeal was taken to the United States Court of Appeals for the Fifth Circuit. In its opinion, the Appellate Court reversed the decision of the trial court as to Appellant SCATA, insofar as Count 8 of the indictment was concerned. In all other respects, the trial court's decision was affirmed. (Appendix A).

## STATEMENT OF THE FACTS

Petitioner and others were charged with violations of federal mail frauds statutes, including an alleged scheme to defraud suppliers of merchandise by using mail and wire communications. The charges alleged the purchase of Porter Hardware, Inc. in Miami, and the placing by Porter of orders for substantial quantities of merchandise. The Government contended that numerous

sellers supplied goods to Porter, many of them relying on the credit reputation of the former owner. It was contended that most of the goods given to Porter were given away or re-sold at less than cost, and stored for later distribution at various warehouses. Deliveries were not alleged to have been used to increase the store's stock of goods. At least $35,000.00 worth of merchandise delivered to Porter on credit was never paid for, according to the Government, which insisted that Porter never intended to pay for the merchandise which had been ordered on credit.

On appeal, Petitioner SCATA relied upon the assertion that the evidence disclosed only his presence at Porter Hardware from time to time. The Appellate Court found that the record showed that SCATA received some merchandise from Porter for his personal use on a few occasions.

The only testimony concerning Petitioner SCATA is as follows:

SCATA was frequently present at Porter Hardware. Merchandise was received from Porter for SCATA'S personal use; there was evidence that at least one sale of merchandise resulted in the items sold being picked up at SCATA'S house; SCATA told a friend who needed tires to go to Porter Hardware, she did so, and used a Porter Hardware credit card for the purchase of the tires. She was never billed for the purchase. A police informant testified that SCATA was at the place frequently and was interested in whether or not the informant could be trusted as an employee.

## REASONS FOR GRANTING WRIT

This case presents a situation where the trial court and the Court of Appeals have rendered decisions in conflict with applicable decisions of this Court and with decisions of other Courts of Appeals on this same matter.

## ARGUMENT

Petitioner SCATA was convicted of substantive charges and of conspiracy charges regarding alleged violations of mail fraud laws. It is respectfully submitted that Petitioner's conspiracy conviction resulted solely from inference unjustified by the evidence, and that the substantive charges resulted in conviction by virtue of the identical inferences used to support the conspiracy charge. No difference in the evidence existed between substantive or conspiracy counts. Since the substantive counts were each aiding and abetting, the end result is that Petitioner was convicted many times on identical evidence.

In its opinion, the United States Court of Appeals for the Fifth Circuit reversed the decision of the trial court as to Petitioner SCATA concerning Count 8. The Court relied upon the decision in **United States v. Maze,** 1974, ___ U.S. ___, 94 Supreme Court 645, 38 L.Ed.2d 603, stating that in **Maze,** mailing occurred after the fraud had been perpetrated and the goods or services obtained, whereas in the case at bar, the remaining counts were, by contrast, predicated upon communications which were a necessary part of the commercial process which led to Porter's receipt of marketable goods. In the remaining counts, affirmed on appeal, the Appellate Court found that Defendants "caused" certain letters to be mailed, and cer-

tain telephone conversations to be made in interstate commerce.

An examination of the evidence discloses that the Government failed to prove the specific charges with regard to Petitioner SCATA. The trial court stated

> "Now, let me say to you with respect to SCATA, that I recognize that virtually in no instance is there any specific documentary reference to him. But there is evidence to show his fairly regular presence". (TR 1629).

The Appellate Court agreed that mere presence at the scene of a crime, or mere association with those involved in a criminal enterprise, is not sufficient to prove participation in a conspiracy, citing **United States v. Falcone** 1940, 311 U.S. 205, 61 Supreme Court 204, 85 L.Ed. 128; **United States v. Webb**, 6th Cir. 1966, 359 F.2d 558.

The Appellate Court distinguished the case at bar from the foregoing cases. The Court stated "the receipt of these items during little more than a two month period, together with his frequent presence at the store, could have led the jury to believe that SCATA knowingly encouraged the scheme by taking for his personal use some of the fruits of the fraud." (Appendix A — Appellate Court decision). The Court also believed that the jury "might reasonably have inferred that SCATA was more than merely a bystander at Porter's Hardware; that, in fact, he was directly involved in the operation if not the management of the enterprise; and that he was aware of and aided in the conspiracy to defraud suppliers by the use of the mails and wire communication. Thus, the Ap-

pellate Court stated that Petitioner SCATA could be convicted based upon possible inference, rather than competent proof of specific facts.

Under these circumstances, it is respectfully submitted that Petitioner SCATA was deprived of due process of law in violation of the Fifth Amendment of the United States Constitution and that the decision of the United States Court of Appeals for the Fifth Circuit conflicts with decisions of the Supreme Court of the United States and of the United States Court of Appeals for the Sixth Circuit in **United States v. Webb,** 359 F.2d 558.

Title 18, Section 1341 requires proof, first, that Petitioner devised or intended to devise a scheme to defraud and that Defendant knowingly caused delivery by mail. Petitioner was present at the store and received merchandise for his own use. There was no evidence, however, that Petitioner devised or intended to devise any scheme to defraud or that he knowingly caused delivery by mail. There was not even evidence that the merchandise received was or was not paid for. Thus, this conviction, under Section 1341, is a violation of due process of law. The Government has included SCATA as a co-conspirator and as an aider and abetter, thereby seeking to correct the deficiencies of its proof on the substantive count by holding Petitioner responsible for crimes committed by other persons. But, as here, where there is no evidence distinguishing the conspiracy from substantive counts, the same facts were used for multiple convictions. This had to result from the fact that nowhere was Petitioner alleged to have done more than be present and receive some merchandise for personal use. Proof of conspiracy, however, must be established by overt acts of **Petitioner,**

linking him to the conspiracy, before he can be held responsible for the actions of co-conspirators. The law requires knowledge and such knowledge was not proved by the Government. The Appellate Court stated that the jury could have inferred a conspiracy and that Scata was a member of the conspiracy. It is submitted, however, that conviction based upon inference of this sort is a deprivation of due process of law. The Appellate Court then went on to state that after the jury inferred a conspiracy and that Scata was a member of the conspiracy, the jury could then find Scata liable as an aider and abetter in the various substantive offenses. It is submitted, that such inference upon inference, resulting in conviction, amounted to deprivation of due process of law.

In **United States v. Webb**, 359 F.2d 558 (6th Cir. 1966), the United States Court of Appeals for the 6th Circuit considered a conspiracy charge and a defendant alleged to have driven a car in participation in a plan. The Court stated:

> "Defendant Stokely's unexplained presence during a series of suspicious events might well justify grave doubts about her role but neither association with conspirators nor knowledge that something illegal is going on, by themselves, constitute proofs of participation in a conspiracy. **United States v. Falcone**, 311 U.S. 205, 61 Sup. Ct. 204, 85 L.Ed. 128 (1940); **United States v. Potash**, 118 F.2d 54 (2nd Cir. 1941).
>
> The evidence of conspiracy—even if circumstantial—must be such as to establish beyond a reasonable doubt, defendant's agreement to or participation in a plan to violate the law. Viewing

> the proof from the point of view favorable to the Government, which is represented in the jury's verdict, we find no evidence to establish Defendant Stokely's agreement to or participation in a conspiracy to possess or transport nontaxed paid whiskey. **United States v. Grimes,** 332 F.2d 101 4 (6th Cir. 1964); **Dennert v. United States,** 147 F.2d 286 (CA 6 1945)."

In **United States v. Bostic,** 480 F.2d 965 (6th Cir. 1973), the Court held that the essential elements of conspiracy include an object to be accomplished, the plan or scheme embodying the means to accomplish the scheme, and an agreement or understanding between two or more defendants to cooperate in accomplishment.

The essential element in conspiracy is an agreement looking toward the commission of an unlawful act and an overt act, and the prosecution must show the same intent that would be required to support conviction of the principal offense. **United States v. Jit Sun Loo,** 478 F.2d 401 (9th Cir. 1973).

The decision of the United States Court of Appeals for the Fifth Circuit in the case at bar, violates the decisions of this Court in **Thompson v. Louisville,** 362 U.S. 199, 4 L. Ed. 2d 654, 80 Sup. Ct. 624, and **United States v. Falcone,** 311 U.S. 205, 61 S. Ct. 204, 85 L. Ed. 128 (1940), and varies from the law as followed in the cases cited above.

In **Thompson, supra,** this Court said . . . "so is it a violation of due process to convict and punish a man without evidence of his guilt."

If the decision of the United States Court of Appeals for the Fifth Circuit as to Petitioner is not reversed, Petitioner will have been deprived of due process of law and will have been convicted, not upon evidence, but upon speculation, inference, and inference upon inference in violation of his constitutional rights.

The United States Court of Appeals for the Fifth Circuit in **Bannister v. U.S.**, 379 F.2d 750, noted that substantive mail fraud counts must be distinguished from a charge of conspiracy, which, being an agreement, calls for proof of an intended use of the mails. No such distinguishing requirement existed as to petitioner.

It is to be noted that in the case at bar, the record is entirely silent as to whether or not Petitioner paid for the merchandise he received. It is submitted that it was incumbent upon the government to prove whether or not Petitioner paid for the merchandise he received as part of its proof of the intent to defraud. It is to be remembered that proof of specific intent to defraud is an essential element of the offense of conspiring to use the mail in furtherance of the scheme to defraud and obtain money by false and fraudulent representation and that the government has the burden of proving such specific intent beyond a reasonable doubt. **United States v. Marine**, 413 F.2d 214 (7th Cir. 1969).

## CONCLUSION

The facts in this case are not distinguishable from the cited holdings requiring more than mere presence to prove a conspiracy.

The result of the affirmance by the Appellate Court was a deprivation of Petitioner's constitutional right to due process of law and a deviation from previous holdings by this Court and by Appellate Courts in other circuits.

WHEREFORE, Petitioner prays that this Court will grant Petition for Certiorari and upon review, reverse the decision of the United States Court of Appeal for the Fifth Circuit.

Respectfully submitted,

/s/ Milton E. Grusmark

MILTON E. GRUSMARK

## CERTIFICATE OF SERVICE

I, Milton E. Grusmark, Attorney for JOSEPH G. SCATA, Petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 27th day of June, 1974, I served copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit as follows:

1. On the United States, by hand delivering a copy thereof to the office of ROBERT RUST, ESQUIRE, United States Attorney for the Southern District of Florida, at 14 N. E. First Avenue, Suite 300, Ainsley Building, Miami, Florida 33132, and by mailing a copy to the Solicitor General, Department of Justice, Washington, D. C. 20530 on June 28, 1974.

/s/ Milton E. Grusmark

MILTON E. GRUSMARK

# APPENDIX

# APPENDIX

## APPENDIX A

UNITED STATES of America, Plaintiff-Appellee,

v.

William E. OWEN, Jr., Frederick Morse Allen, Joseph G. Scata and Julius Grossman, Defendants-Appellants.

No. 72-3646.

United States Court of Appeals,
Fifth Circuit.

April 19, 1974.

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Appeals from the United States District Court for the Southern District of Florida.

Before RIVES, WISDOM and MORGAN, Circuit Judges.

RIVES, Circuit Judge:

William E. Owen, Jr., Joseph G. Scata, Julius Grossman, Frederick Morse Allen and seven others were indicted for conspiracy, 18 U.S.C. §371; substantive violations of the federal mail fraud statutes, 18 U.S.C. §§ 1341, 1342, 1343; and aiding and abetting, 18 U.S.C. § 2. After a jury trial, Owen, Scata, Grossman and Allen all were convicted on the conspiracy count.[1] Also, Scata was convicted on six

substantive counts; Owen on five substantive counts; and Grossman on two substantive counts.[2] Scata was sentenced to concurrent four-year prison terms on the substantive counts and to a consecutive two-year term on the conspiracy count. Owen was sentenced to concurrent four-year terms on five counts and to a consecutive one-year term on one count. Grossman was placed on probation for three years and fined $5,000. Allen was placed on probation for four years and fined $3,000. All four convicted defendants appeal.

The government's theory in this case is that the appellants and others devised and implemented a scheme to defraud suppliers of merchandise, and used the mails and wire communications in furtherance of their scheme. On May 26, 1971, William Owen bought Porter Hardware, Inc., a small hardware store in Miami, for about $5,000. Between May 26 and August 6, 1971, Porter placed orders for substantial quantities of merchandise. The government introduced evidence showing that Porter personnel in placing these orders sometimes used fictitious names. Numerous sellers supplied goods to Porter, many of them relying upon the credit reputation developed by the former owner. Most of the goods delivered to Porter were dissipated, that is, given away, resold at less than cost, and stored for later distribution at various warehouses. Deliveries were not used to replenish or increase the store's stock of goods. Only about $20 was kept in the store's cash register and

[1]Count 15 of the indictment.

[2]Scata was convicted on substantive Counts 2, 4, 5, 7, 8, 12; Owen on substantive Counts 2, 4, 5, 7, 12; and Grossman on substantive Counts 4 and 5.

little business was done with walk-in customers inside the store. At least $35,000 worth of merchandise delivered to Porter on credit was never paid for. The government insists that the appellants never intended to pay for the merchandise ordered on credit.

I. Sufficiency of the Evidence to Show a Violation of 18 U.S.C. § 1341 or § 1343.

We first consider whether the acts proved by the government come within the scope of the mail fraud and wire communication fraud statutes. The most recent case in which the Supreme Court has considered the reach of 18 U.S.C. § 1341 is United States v. Maze, 1974, — U.S. —, 94 S.Ct. 645, 38 L.Ed.2d 603. The Court held that where an individual used a stolen credit card to obtain goods and services from motel operators, the sales slips were mailed by the motel operators to a bank, and the bank in turn mailed the slips to the true owner of the card, the mailings were not so closely related to the scheme as to bring the individual's conduct within the scope of 18 U.S.C. § 1341.

[1] Count 8 of the indictment in this case charged that certain defendants, for the purpose of executing the scheme, knowingly caused a letter addressed to the Gulf Oil Corporation in Atlanta to be sent and delivered by the U. S. Post Office Department and Postal Service. According to the government's brief on appeal, this count was based upon the mailing of credit card hardbacks from a service station to Gulf after the use of a Porter Gulf credit card by a Porter employee acting at appellant Scata's direction. Under the holding in Maze, Scata's conviction under Count 8 must be reversed. We find nothing to distinguish the situation here from the situation in Maze.

[2] Count 2 of the indictment charged that certain defendants caused the mailing of a letter to Colony Paints in Baltimore, Maryland. This count was based upon a purchase order signed by Owen and given to a Colony salesman. Count 5 alleged that certain defendants caused a letter to be sent to Delta Finance Corp. of Cincinnati, Ohio. Testimony at trial indicated that Porter ordered 100 cameras from Delta by mail. Count 7 alleged that certain defendants caused Atlas Tool and Manufacturing Co. to send a letter to Porter. This count rested upon a mailing to Porter of ten minibike manufacturer's certificates necessary to license the minibikes under Florida law. Count 12 alleged that certain defendants "transmitted and cause[d] to be transmitted signs, signals, and sounds in interstate commerce by means of a wire communication, that is, a telephone conversation between Miami, Florida, and Brunswick, Georgia." (R. 14.) By this conversation, Porter ordered paint from Dixie-O'Brien Corporation.

The communications in Counts 2, 5, 7 and 12 are readily distinguishable from the situation in Maze, supra. In Maze, the mailings occurred after the defendant had perpetrated the fraud and obtained the goods or services which were the object of the scheme. By contrast, the communications in these counts were a necessary part of the commercial process which led to Porter's receipt of marketable goods on credit. The relation of these communications to the scheme sufficed to bring the conduct within the scope of 18 U.S.C. § 1341 and § 1343.

[3] Count 4 of the indictment presents a closer question. Count 4 charged that certain defendants caused Moore-Handley Hardware of Birmingham, Alabama, to send a letter to Porter. This letter confirmed a phone order

for a substantial quantity of garbage cans and a number of plastic coolers. It also stated that "Prices are fob Miami with delivery by the manufacturer's truck. Our terms are 2%—10th Prox, net 30 days." The letter further stated that "Enclosed is credit form which we ask that you fill out and return in the enclosed envelope." Unlike the communications involved in Counts 2, 5, 7 and 12, this letter was not, from Porter's point of view, necessary in order to receive marketable merchandise. This letter was, however, in accord with business practices associated with the sale of goods, and Moore-Handley obviously sent this letter as a part of the transaction which resulted in the shipment of merchandise to Porter. Under these circumstances, the jury could have found that the defendants "caused" the mails to be used, Pereira v. United States, 1954, 347 U.S. 1, 9, 74 S.Ct. 358, 98 L.Ed. 435, and that the mailing was sufficiently closely related to the scheme so as to bring the conduct within the statute. United States v. Maze, supra.

## II. Sufficiency of the Evidence as to Individual Defendants.

Appellants do not contend that Porter Hardware was a legitimate business operation during the period from May 26 until August 6. As to Scata, Grossman and Allen, each claims that there was insufficient evidence to support his conviction for conspiracy and for the various substantive offenses.

### A. Scata

[4] Scata claims that the evidence discloses only that he was present at the Porter Hardware store from time to

time. In support of this contention, Scata quotes the trial judge, who stated the following in denying a motion for judgment of acquittal on one of the substantive counts: "Now, let me say to you with respect to Scata that I recognize that virtually in no instance is there any specific documentary reference to him. But there is evidence to show his fairly regular presence." (Tr. 1629.) It is true that mere presence at the scene of a crime, or mere association with those involved in a criminal enterprise, is not sufficient to prove participation in a conspiracy. United States v. Falcone, 1940, 311 U.S. 205, 61 S.Ct. 204, 85 L.Ed. 128; United States v. Webb, 6 Cir. 1966, 359 F.2d 558. However, this is not such a case. The record shows that Scata received merchandise from Porter for his personal use. The items he received apparently included brushes and hoses, a machine for making threads on a screw, a battery, a boat hoist, paint for his home, two minibikes, some wood, and other boxes of unidentified goods. The receipt of these items during little more than a two month period, together with his frequent presence at the store, could have led the jury to believe that Scata knowingly encouraged the scheme by taking for his personal use some of the fruits of the fraud.

[5] There was evidence that Scata helped arrange at least one sale of merchandise—a witness testified that he bought a minibike from Porter, and that Scata asked him to come by his house to pick it up. Also, on one occasion Scata told a woman who needed tires to come to Porter Hardware. When the woman came to the store, Scata was present. He took her car keys and gave them to a Porter employee who then used a Porter credit card to get new tires. The woman was never billed for the tires. Included in police informant Snider's testimony for the government is the following:

"Q. After you began working, Mr. Snider, at Porter Hardware, Inc., did you have occasion at any time to see or talk with the defendant Joe Scata at Porter Hardware, Inc., or elsewhere concerning Porter Hardware's business?

"A. Yes. Mr. Scata was in there frequently. I was introduced to him by Bill [Owen] when I started there. Their initial conversation there was basically Mr. Scata was interested in more than anything whether or not I could be trusted as an employee there." (Tr. 1162-1163.)

From these incidents, coupled with his frequent presence at the store, the jury might reasonably have inferred that Scata was more than merely a bystander at Porter Hardware; that, in fact, he was directly involved in the operation if not the management of the enterprise; and that he was aware of and aided in the conspiracy to defraud suppliers by the used of the mails and wire communication.

Scata urges that the evidence shows no participation by him in the communications which form the basis of the substantive counts of the indictment. The government responds that Scata was an aider and abettor on each of the substantive counts, and that Scata received substantial portions of the merchandise ordered from the various suppliers.

[6] The jury could have inferred from the evidence that there was a conspiracy to defraud suppliers of merchandise, and that Scata was a member of the conspiracy.

It follows that the jury could find Scata liable as an aider and abettor in the various substantive offenses. The substantive offenses charged in the indictment result from transactions between Porter Hardware and various suppliers. The individual transactions were merely a part of the general plan. If Scata participated to the extent that he conspired with others in a scheme designed to defraud suppliers, then the jury could properly find that he expected and encouraged the individual communications which constitute the substantive offenses. This would be sufficient participation to make Scata an aider and abettor under substantive Counts 2, 4, 5, 7 and 12.

This result is consistent with Pinkerton v. United States, 1946, 328 U.S. 640, 66 S.Ct. 1180, 90 L.Ed. 1489, where the Supreme Court states that a party to a continuing conspiracy may be responsible for substantive offenses committed by a coconspirator in furtherance of the conspiracy, even though he does not participate in the substantive offenses or have any knowledge of them.

B. Grossman

[7] Grossman urges that the evidence of record was insufficient to submit the question of his guilt to the jury. We disagree.

Police informant Snider testified that Grossman was in the store "some weeks every day. Other times he would be in three or four times a week." (Tr. 1198.) He overheard Grossman talk with Owen about "certain items that were to arrive at the store that day, and that he [Grossman] was to come back later in the afternoon to check them out, if he wanted to purchase them" (Tr. 1199), and about the

fact "that the items that Julie was waiting for had not come in yet" (Tr. 1200). Another witness testified that Grossman, when he came to the store, would sometimes ask: "Well, did you get any new shipments in today, something that I may be interested in?" (Tr. 273.)

Snider also testified concerning a conversation he had with Grossman. Grossman allegedly said that "he liked my [Snider's] security because I kept watching for people to see if anybody would be following us" (Tr. 1204); that "I [Grossman] do not want to be around Porter Hardware in the event or whenever police are called in or if they are called in" (Tr. 1206); and that "he [Grossman] felt that it was getting very warm here" (Tr. 1206). Snider testified that on one particular trip he hauled a truckload of merchandise from the warehouse to Grossman's home, helped unload it, and received $400 from Grossman for Owen.

Policeman Tucker testified that Grossman's vehicle was used on a regular basis at Porter Hardware. Tucker further testified that Grossman stated during an interview that he had been at Porter Hardware many times and had purchased power drills, tools, coolers, caulking compound, screwdrivers, and Polaroid cameras. Grossman also stated that he paid less than wholesale for the items he bought.

The jury could have concluded that Grossman's comments to Snider about security and about the police revealed a guilty mind. These comments, plus Grossman's purchases from Porter, including purchases at below the wholesale price of the merchandise, are sufficient to support his conviction on the conspiracy charge. Grossman's purchases of garbage cans and Polaroid cameras, taken

together with the other evidence against him, could have led the jury to infer that Grossman knowingly encouraged the mailings which led two suppliers to send merchandise to Porter Hardware. We therefore conclude that the evidence was sufficient to hold Grossman liable as an aider and abettor under substantive Counts 4 and 5 of the indictment.

C. Allen

[8] Allen claims that there is not the slightest hint in the record of an agreement between him and any other person for the commission of a crime. We view the record differently.

Informer Snider testified that Allen was present at Porter Hardware "very often, two to three times, four times a week and sometimes more. He was there as a buyer of the products which came in." (Tr. 1180.) Snider further stated that he delivered a truck full of plastic garbage cans to Allen, and that he helped Allen load battery cables, cutlery and other items into Allen's car for sale to customers. On one occasion Allen explained the Porter operation to Snider as follows: "He told me that items were bought on credit and then sold for cash at half their wholesale price or whatever their billing price was; that this was the going figure." (Tr. 1188.) According to Snider's testimony, Allen also suggested burning the insulation from copper wire to sell the copper for about $15,000 as scrap metal.

Policeman Tucker testified that Allen told him that he was a salesman for Porter and had sold aerosol paints, garbage cans, garden hoses, Black and Decker tools, and barbecue (equipment).

From this evidence, the jury could have inferred that Allen knew about the Porter Hardware operation, and that, through his efforts to resell the merchandise, he participated in the scheme to defraud suppliers.

## III. Owen's Claims.

On August 6, 1971, police officers stopped the automobile which Owen was driving, and one officer searched through a paper bag on the front seat of the vehicle. He found a revolver. Owen was thereupon arrested and later charged with violation of 18 U.S.C. App. § 1202(a), possession of a gun by a convicted felon. At the police station, Postal Inspector Conner, who was investigating Porter Hardware, interviewed Owen and told him he was suspected of mail fraud. Conner invited Owen to come to his office at a later date to discuss the situation. Owen went to Conner's office on August 10 and on a number of later occasions.

The government and Owen apparently agree that, at a hearing on the gun charge on August 12 before the United States Magistrate, government attorney Quinn advised Owen's counsel, Koste, that in return for Owen's cooperation and testimony in a mail fraud case, either Owen would not be indicted or, if Owen were indicted and convicted, the government would recommend probation. Koste recalled that Owen was to be "an unindicted coconspirator or an indicted co-conspirator." (Tr. on Motions to Suppress 429-430.) Owen now claims this indicates he was to be indicted, if at all, on only one count of conspiracy. The gun charge was later dismissed.

Sometime between September 12 and October 9, 1972, Owen's new attorney, Tifford, spoke with Quinn. According to Tifford, Quinn on this occasion stated that the government would advise the court of Owen's cooperation, but would not recommend probation. Quinn, in a conference before the judge during the trial, could not recall whether he specifically mentioned a recommendation of probation in his conversation with Tifford. Quinn did make clear at trial, however, that so long as the trial continued, the government stood ready to recommend probation if Owen would cooperate and testify.

[9] A. Owen claims first that the agreement in question and certain evidence obtained pursuant to the agreement were "tainted" by being the direct or indirect products of an illegal search, seizure and arrest, and should have been suppressed. The government replies that the search of Owen's car, the seizure of the revolver, and the subsequent arrest were legal. The government further responds that even if the arrest was illegal, Owen's cooperation with Conner was voluntary and with full awareness of his rights. We do not pass upon the legality of Owen's arrest on the gun charge, for it is clear to us from the facts of this case that, even assuming that the arrest was unlawful, any taint arising from the arrest had dissipated by the time Owen agreed to cooperate with the authorities in the mail fraud case.

In Wong Sun v. United States, 1963, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441, the Supreme Court held that the statements by one defendant, Toy, made in his bedroom at the time of an unlawful arrest, were the fruits of unlawful action, and should have been suppressed. The Court likewise held that the narcotics taken from another de-

fendant on the basis of Toy's statements were fruits of illegality, and should not have been admitted. The Court in Wong Sun recognized, however, that the connection between an illegal arrest and a subsequent statement could " 'become so attenuated as to dissipate the taint.' Nardone v. United States, 308 U.S. 338, 341, 60 S.Ct. 266, 84 L.Ed. 307." 371 U.S. at 491. On the evidence that one defendant had been released on his own recognizance after a lawful arraignment, and had returned voluntarily several days later to make a statement, the Court found that such a dissipation had occurred, and upheld a conviction based in part upon the statement. The Court emphasized that the test of admissibility was not whether the evidence would not have come to light "but for" the illegal actions of the police; "[r]ather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)." 371 U.S. at 488.

This Court has discussed Wong Sun on a number of occasions and has developed several guidelines to help determine when the taint of an illegal arrest is sufficiently dissipated that evidence secured after the arrest is admissible in a criminal trial. Rogers v. United States, 5 Cir. 1964, 330 F.2d 535; Thomas v. United States, 5 Cir. 1967, 377 F.2d 118; Phelper v. Decker, 5 Cir. 1968, 401 F.2d 232; Bretti v. Wainwright, 5 Cir. 1971, 439 F.2d 1042. These guidelines include the proximity of the illegal arrest to the procurement of the evidence; the intervening occurrences between the arrest and the acquisition of the evidence, and the circumstances under which the arrest was made. Phelper v. Decker, supra, 401 F.2d at 237-238.

So far as the record indicates, no one interrogated Owen, or elicited information from him, or offered him a deal while he was in custody on the gun charge. Conner did speak with Owen soon after his arrest on August 6; however, according to Conner's uncontradicted testimony, only the following occurred:

> "I told Mr. Owen that we had been conducting surveillance at Porter Hardware, the activities that had been going on there were not legitimate operations; that he concurred that I would want to talk to him further about it and that he would come down to the office." (Tr. on Motions to Suppress, 372.)

Four days later, after his release from custody, Owen voluntarily visited Conner at Conner's office. At this time Conner and Owen apparently discussed the possibility of Owen's cooperation with the authorities in the Porter Hardware case. On both August 6 and August 10, Conner advised Owen of his constitutional rights, including his right to an attorney.

From these facts it seems clear that any taint associated with Owen's arrest had dissipated by the time Owen agreed to cooperate with the government in its investigation. We note particularly the four-day time lapse between the arrest and the initial discussion, the voluntariness of Owen's visit to Conner's office, the lack of oppressive or custodial circumstances at the time that Owen and Conner discussed an agreement, the legal warnings provided by Conner, and the fact of a quid pro quo for Owen's cooperation.

[10] B. Owen's second contention is that enforcement of the bargain would bar his prosecution. Santobello v. New York, 1972, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427, establishes that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. This case might more generally support the proposition that where a prosecutor has made a promise or agreement, the defendant may hold him to it. At trial, however, Owen did not attempt to hold the prosecutor to the original agreement.

[11] When the trial judge asked Tifford whether Owen was proposing to testify in return for a recommendation of probation, Tifford replied: "No, Judge, Mr. Owen is of the position that when the Government backed off, his consent was negated." (Tr. 707.)

Tifford later commented:

> "My answer is that Mr. Owen is not testifying, and the part of the reason is that among other things I do not believe the Government can revitalize a promise made after its retracted position taken at trial because of that retraction." (Tr. 714-715.)

Tifford thus indicated that Owen did not seek specific performance of the plea bargain at trial. To the contrary, he insisted upon his right to undo whatever had been done pursuant to the agreement. Owen cannot now switch fields. He waived whatever rights he had to demand performance of the agreement when he chose to pursue a different strategy.

[12] C. Owen's third contention is that when the government suggested that it would violate its part of the agreement, he had the right to rescind the agreement, and to suppress any evidence secured by the government as a result of prior cooperation under the agreement. The government theorizes that Owen suffered no prejudice from any temporary repudiation, since at trial the government stood ready to recommend probation if Owen would cooperate and testify.

The trial judge denied Owen's motion to suppress evidence obtained by the government through Owen's cooperation under the agreement. In particular, Owen had objected to many exhibits allegedly found after he consented to a search of the Porter Hardware premises. The trial judge in denying Owen's motion explained that,

> "* * * as I see the evidence and see the proof, the Government stands fast and did at the beginning of the trial on this question of offering a recommendation of probation if Mr. Owen testified. And we are now at the point where Mr. Owen has not testified. And I think it does not reach the level of even having to pass upon it. In other words, I think the Government is ready and Mr. Owen apparently is not." (Tr. 1602.)

Clearly, Owen was entitled to refuse at any time to cooperate further with the authorities and to refuse to testify at the trial. The difficult question concerns whether evidence obtained through Owen during the period of cooperation should have been admitted, if the government first repudiated the agreement and later offered to reinstate it. A contract analogy suggests that the government's

retraction of its promise entitled Owen at his option to rescind the agreement and to recover (in this case, through suppression) any prior performance under the agreement.[3] Commercial law also suggests that until the government's next performance was due, it could retract its repudiation, unless Owen had cancelled the agreement, materially changed his position, or otherwise indicated that he considered the repudiation final.[4] In this case Owen claims that his attorney made clear his cancellation of the agreement.

One problem with relying upon a commercial law analogy is that the provisions regarding anticipatory repudiation are based in part upon a desire to allow the nonbreaching party an opportunity to make new arrangements with others as a substitute for the repudiated contract. In the case of an agreement with the prosecutor, there is no other party besides the government with whom the prospective defendant may deal. This undercuts the argument that commercial law principles should be followed insofar as they give a nonbreaching party an absolute right to cancel or rescind an agreement, and a right to recover any part performance, upon anticipatory repudiation by the other party.

The government argues that even if there was an anticipatory repudiation, there was no injury or prejudice to Owen, and thus no reason to allow Owen a right to rescind the agreement.[5] This argument has considerable force

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[3]Uniform Commercial Code § 2-610, § 2-703, § 2-711.

[4]Uniform Commercial Code § 2-611.

[5]The word "rescind" in this context includes a right to "recover" past performance, in this case through suppression.

in the circumstances of this case. First, the government at trial offered to perform its part of the bargain. In conference with the trial judge, Owen's attorney did not claim that the government was not offering that which had originally been promised. Therefore, Owen at the time of the trial apparently could have secured exactly that for which he originally bargained. Second, Owen alleges no particular prejudice or injury as a result of the government's temporary repudiation. Some possible grounds of prejudice were dismissed in a conference before the trial judge. Owen's attorney suggested that Owen had been prejudiced "by virtue of his posture as being a defendant in the case, by certain evidence coming in." (Tr. 717.) Owen apparently felt that this might prejudice the judge against him. It was also suggested that the government's action interfered with the trial preparations of Owen and the other defendants. Neither of these claims is made in Owen's brief on this appeal, and we conclude that both are insubstantial under the circumstances of this case.

In the absence of any prejudice to Owen, we conclude that the government's alleged temporary repudiation did not give Owen the right to rescind the agreement at a time when the government was ready, able and willing to perform its part of the bargain.

## IV. Other Claims.

[13] A. Appellants contend that the jury selection procedure in operation in the Southern District of Florida at the time of their trial was unconstitutional because it excluded young persons (18 to 21 and 21 to 24), Latin Americans, and new residents (those who had not resided

in the district for a year). This Court has considered and rejected these identical claims in a number of prior cases,[6] and we do so again in the circumstances of this case.

[14] The appellants in this case are not in a position to raise the issue considered in United States v. De Alba-Conrado, 5 Cir. 1973, 481 F.2d 1266. After the jurors were sworn, the following occurred:

> "MR. GRUSMARK: For the purpose of the motion before the Court, may I be permitted to ask how many are from Dade and Broward Counties?
>
> (Bench conference concluded)
>
> "THE COURT: Those of you who are in Dade County, will you raise your hands, please?
>
> Those of you who are from Broward County, please raise your hands.
>
> "MR. GRUSMARK: Thank you, Judge.
>
> "THE COURT: Would you agree there is a substantial number from each county?
>
> "MR. GRUSMARK: Yes, sir." (Tr. 25.)

The record reveals that counsel and the trial judge had agreed that Mr. Grusmark, Scata's attorney, would act as

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[6]See United States v. Perry, 5 Cir. 1973, 480 F.2d 147; United States v. Palacio, 5 Cir. 1973, 477 F.2d 560; United States v. Pentado, 5 Cir. 1972, 463 F.2d 355; United States v. Blair, 5 Cir. 1972, 470 F.2d 231; United States v. Gooding, 5 Cir. 1973, 473 F.2d 425.

primary spokesman for the defendants, and that objections made by him would apply to all. Under these circumstances, Mr. Grusmark's response to the court's question, and the failure of any of the other defendants to object to Mr. Grusmark's response, preclude the defendants from relying upon the argument raised in United States v. De Alba-Conrado, supra.

[15] B. Appellants Owen and Grossman contend that the speed with which the prosecution proceeded to trial, the brevity between the discovery conducted by the government pursuant to court order and the outset of trial, and the manner in which discovery was effected prior to and during the early stages of this trial denied them effective assistance of counsel.

There was a good deal of confusion and difficulty in the disclosure of evidence in this case. The trial judge was alerted to the problems which arose and made continuing efforts to insure that the defendants received all the materials to which they were entitled. The judge insisted, however, that the trial go forward and denied a motion to dismiss based on the government's failure to produce certain statements.

United States v. Saitta, 5 Cir. 1971, 443 F.2d 830, 831, suggests the law to be applied in examining whether appellants' claims here would justify reversal:

> "Appropriate relief for a violation of the discovery rules lies within the sound discretion of the district court, Gevinson v. United States, 5 Cir., 1966, 358 F.2d 761, 766; Ginsberg v. United States, 5 Cir., 1958, 257 F.2d 950, 956,

> but we do not reach the question of an abuse of discretion here. It suffices to say that an error in administering the discovery rules is not reversible absent a showing that the error was prejudicial to the substantial rights of the defendant. Hansen v. United States, 8 Cir., 1968, 393 F.2d 763, 770."

In the instant case, appellants have alleged no specifics about how they were harmed by the trial court's refusal to grant a continuance. They have not shown prejudice of the sort which might require reversal, even if the trial court had abused its discretion, of which contingency we are by no means convinced.

The judgment of conviction of Appellant Scata under Count 8 of the indictment is reversed. Otherwise, we find no reversible error as to any of the appellants and their respective judgments of conviction are affirmed.

Reversed as to Appellant Scata insofar as Count 8 of the Indictment is concerned. In all other respects, affirmed as to each of the appellants.

## APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 72-3646

---

Filed May 28, 1974

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

WILLIAM E. OWEN, JR.,
FREDERICK MORSE ALLEN, JOSEPH G. SCATA,
and JULIUS GROSSMAN,
Defendants-Appellants.

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Appeals from the United States District Court
for the Southern District of Florida.

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**ON PETITIONS FOR REHEARING**

Before RIVES, WISDOM and MORGAN, Circuit Judges.
BY THE COURT:

IT IS ORDERED that the motion of appellant Julius Grossman to join in petition for rehearing filed by appellant William E. Owen, Jr., be and the same is hereby GRANTED.

IT IS FURTHER ORDERED that the petitions for rehearing filed on behalf of William E. Owen, Jr., Joseph G. Scata and Julius Grossman be and the same are hereby DENIED.

## APPENDIX C

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 14, 1974

Milton E. Grusmark, Esq.
1720-79th Street Causeway
Suite 110
Miami Beach, Florida 33141

RE: Joseph G. Scata v. United States,
A-1190

Dear Mr. Grusmark:

Your application for stay in the above-entitled case was presented to Mr. Justice Powell, who has endorsed thereon the following:

"Denied.
L.F.P.
6/13/74"

Very truly yours,

MICHAEL RODAK, JR., Clerk

By James H. Blondell
James H. Blondell
Assistant Clerk

JHB:lab
cc: Honorable Robert H. Bork
Solicitor General of the United States

## APPENDIX D

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

June 24, 1974

Milton E. Grusmark, Esq.
Suite 110
1720 - 79th Street Causeway
Miami Beach, Fla. 33141

RE: Joseph G. Scata v. United States,
A-1190

Dear Sir:

The Court today entered the following order in the above-entitled case:

The application for stay of the mandate of the United States Court of Appeals for the Fifth Circuit presented to Mr. Justice Douglas, and by him referred to the Court, is denied. Mr. Justice Douglas took no part in the consideration or decision of this application.

Very truly yours,

MICHAEL RODAK, JR., Clerk

By Helen Taylor
Helen Taylor, (Mrs.)
Assistant Clerk

Hon. Robert H. Bork
Solicitor General of the United States
Dept. of Justice
Washington, D.C. 20530

## APPENDIX E

JUDGMENT AND COMMITMENT
UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF FLORIDA

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No. 72-602-Cr-CA
Filed December 20, 1972

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UNITED STATES OF AMERICA

v.

JOSEPH SCATA

On this 20th day of December, 1972 came the attorney for the government and the defendant appeared in person and[1] by counsel, Milton Grusmark, Esquire,

IT IS ADJUDGED that the defendant upon his plea of[2] not guilty, and a verdict of guilty, has been convicted

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[1]Insert "by [name of counsel], counsel" or without counsel; the court advised the defendant of his rights to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel." [2]Insert (1) "guilty and the court being satisfied there is a factual basis for the plea," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be. [3]Insert "in count(s) number " if required. [4]Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding unserved sentence; (3) whether defendant is to be further imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law. [5]Enter any order with respect to suspension and probation. [6]For use of Court to recommend a particular institution.

of the offense of conspiracy to knowingly and wilfully use the United States Mails, and conspiracy to transmit and cause to be transmitted writings, signs, signals and sounds in interstate commerce by means of wire communications for the purpose of executing a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, in violation of Title 18, United States Code, Section 371, and knowingly and wilfully transmitting writings, signs, signals and sounds in interstate commerce by means of wire communications for the purpose of executing said scheme, in violation of Title 18, United States Code, Section 1343 and 2, and knowingly and wilfully did use the United States Mails for purpose of executing said scheme, in violation of Title 18, United States Code, Section 1341 and 2, as charged[3] in counts 2, 4, 5, 7, 8, 12, 15 of the Indictment, and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of[4] FOUR (4) YEARS, or until otherwise discharged by due process of law as to each of counts 2, 4, 5, 7, 8, 12, said sentence of confinement shall run concurrently as to each of the above-stated counts and imprisonment for a period

of TWO (2) YEARS as to count fifteen, said sentence imposed in count fifteen shall run consecutive to the sentence imposed in counts 2, 4, 5, 7, 8, and 12.

Certified to be a true and correct copy of the original.

U. S. District Court
Joseph I. Bogart, Clerk
Southern Dist. of Fla.

By E. J. Parker
Deputy Clerk

Date: 12/27/72

IT IS ORDERED that the Clerk delivered a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ C. Clyde Atkins,

C. CLYDE ATKINS
United States District Judge.
Joseph I. Bogart, ejp
Clerk.

The Court recommends commitment to[6]

## APPENDIX F

## INDICTMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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No. 72-602-Cr-CA

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18 U.S.C. 371
(5 Yrs. & $10,000)
18 U.S.C 1341 and 2
(5 Yrs & $1,000)
18 U.S.C. 1342
(5 Yrs. and $1,000)
18 U.S.C. 1343 and 2
(5 Yrs. and $1,000)

UNITED STATES OF AMERICA

vs.

JOSEPH G. SCATA
WILLIAM E. OWEN, JR.
LANCE LAWRENCE COOL
THOMAS H. VARCO
BEN NONKIN
JULIUS L. GROSSMAN
ANGELO JOSEPH CIULLA
AGOSTINO AMATO
NILO DABAG
LEROY PRESLEY
FREDERICK MORSE ALLEN

THE GRAND JURY CHARGES:

COUNT ONE

1. From on or about May 1, 1971, to on or about August 31, 1971, in the Southern District of Florida, and elsewhere, defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, THOMAS H. VARCO, BEN NONKIN, JULIUS L. GROSSMAN, ANGELO JOSEPH CIULLA, and LEROY PRESLEY devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from persons, firms, partnerships and corporations, then and there engaged in the business of selling and furnishing merchandise and property (hereinafter referred to as suppliers) who could, and would, be induced by the defendants to supply and furnish merchandise and property on credit to the defendants, said defendants well knowing and intending that the pretenses, representations and promises would be and were false when made, and which said scheme and artifice was, in substance, as follows:

2. It was a part of the said scheme and artifice that on or about May 26, 1971, defendants JOSEPH G. SCATA and WILLIAM E. OWEN, JR., would and did purchase PORTER HARDWARE, Inc., a Florida corporation and retail hardware business at 5908 N.W. 2nd Avenue, Miami, Florida (hereinafter referred to as PORTER HARDWARE), and that in payment therefor defendant WILLIAM E. OWEN, JR. would and did prepare and issue promissory notes then and there well knowing and intending that said promissory notes would not be paid when presented for payment.

3. It was a further part of said scheme and artifice that WILLIAM E. OWEN, JR., and LANCE LAWRENCE COOL, also using the false and fictitious name of ROBERT HAVEN and R. HAVEN, would and did represent themselves to be officers of PORTER HARDWARE.

4. It was a further part of the said scheme and artifice that WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, and LEROY PRESLEY would be and did act as agents and representatives of and for PORTER HARDWARE and would operate PORTER HARDWARE pursuant to the instructions and advice of JOSEPH G. SCATA.

5. It was a further part of said scheme and artifice that LANCE LAWRENCE COOL would use and assume a false and fictitious name, to wit, ROBERT HAVEN, to conceal his true identity from suppliers and credit reference services.

6. It was a further part of said scheme and artifice that in communicating with suppliers and credit reference services, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, and LEROY PRESLEY would and did falsely represent, and use business cards and stationery falsely representing, the type and scope of business in which PORTER HARDWARE was engaged.

7. It was a further part of said scheme and artifice that WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, THOMAS H. VARCO, BEN NONKIN, JULIUS

L. GROSSMAN, ANGELO JOSEPH CIULLA, and LEROY PRESLEY would and did use the previously established good credit rating of PORTER HARDWARE to induce suppliers to furnish merchandise to PORTER HARDWARE and themselves on credit.

8. It was a further part of said scheme and artifice that JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, THOMAS H. VARCO, BEN NONKIN, JULIUS L. GROSSMAN, and LEROY PRESLEY would and did order and receive and willfully cause to be ordered and received on behalf of PORTER HARDWARE large quantities of merchandise from said suppliers on credit, then and there well knowing and intending that payment for said merchandise and property would not be made at any time.

9. It was a further part of said scheme and artifice to defraud that, to induce said suppliers to send and furnish merchandise to PORTER HARDWARE, and in order to lull said suppliers into a false sense of security, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, also using the name of ROBERT HAVEN, ANGELO JOSEPH CIULLA, and LEROY PRESLEY, would and did prepare, issue, send and deliver and willfully cause to be prepared, issued, sent and delivered, checks and promissory notes to said suppliers in pretended payment for said merchandise, then and there well knowing and intending that said checks and promissory notes would not be paid when presented for payment.

10. It was a further part of said scheme and artifice that JOSEPH G. SCATA, WILLIAM E. OWEN, JR.,

LANCE LAWRENCE COOL, THOMAS H. VARCO, BEN NONKIN, JULIUS L. GROSSMAN, ANGELO JOSEPH CIULLA and LEROY PRESLEY would and did retain for their own use and benefit the said merchandise and the proceeds from the sale thereof without accounting to the said suppliers for the disposition of said merchandise.

11. It was a further part of said scheme and artifice that WILLIAM E. OWEN, JR., also using the false and fictitious name of FRANK CHURCH, would and did willfully cause to be issued credit cards in the name of PORTER HARDWARE, INC., which JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, and LEROY PRESLEY would and did use and willfully cause to be used to obtain goods, services, and property, then and there well knowing that payment would not be made in accordance with the terms specified by the issuer of said credit card.

12. On or about June 6, 1971, in the Southern District of Florida, the defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., using the name of FRANK CHURCH, LANCE LAWRENCE COOL, and ANGELO JOSEPH CIULLA, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, knowingly did place and cause to be placed in an authorized depository for mail a letter addressed to Gulf Oil Company — U.S., Post Office Box 7245, Station C, Atlanta, Georgia 30309, to be sent and delivered by the United States Post Office Department and Postal Service and did knowingly cause said letter to be delivered by mail according to the direction thereon.

All in violation of Sections 1341 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT TWO

1. The Grand Jury realleges all of the allegations contained in Paragraphs 1 through 11, inclusive, of Count One of this Indictment, and further alleges:

2. On or about June 8, 1971, in the Southern District of Florida, defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, and THOMAS H. VARCO, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Colony Paints, 1401 Severn Street, P.O. Box 778, Baltimore, Maryland 21230, to be sent and delivered by the United States Post Office Department and Postal Service and did knowingly cause said letter to be delivered by mail according to the direction thereon.

All in violation of Sections 1341 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT THREE

1. The Grand Jury realleges all of the allegations contained in Paragraphs 1 through 11, inclusive, of Count One of this Indictment, and further alleges:

2. On or about June 9, 1971, in the Southern District of Florida, defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did cause to be placed in an authorized depository for mail matter a letter from Mercer Plastics Company, Inc., 1 Jabez Street, Newark, N.J., addressed to PORTER HARDWARE Co., 5908 N.W. 2nd Avenue, Miami, Florida 33127 to be sent and delivered by the United States Post Office Department and Postal Service and did knowingly cause said letter to be delivered by mail according to the direction thereon.

All in violation of Sections 1341 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT FOUR

1. The Grand Jury realleges all of the allegations contained in Paragraphs 1 through 11, inclusive, of Count One of this Indictment, and further alleges:

2. On or about June 14, 1971, inthe Southern District of Florida, defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, BEN NONKIN, and JULIUS L. GROSSMAN, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, knowingly did cause to be placed in an authorized depository for mail matter a letter from Moore-Handley, Inc., 320 N.E. 75th Street, P.O. Box 759, Miami, Florida

33138, addressed to PORTER HARDWARE COMPANY, 5908 N.W. 2nd Street, Miami, Florida, to be sent by the United States Post Office Department and Postal Service and did knowingly cause said letter to be delivered by mail according to the direction thereon.

All in violation of Sections 1341 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT FIVE

1. The Grand Jury realleges all of the allegations contained in Paragraph 1 through 11, inclusive, of Count One of this Indictment, and further alleges:

2. On or about June 26, 1971, in the Southern District of Florida, defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, and JULIUS L. GROSSMAN, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, knowingly did place and cause to be placed in an authorized depository for mail matter a letter addressed to Delta Finance Corp., 6900 Valley Lane, Box 44098, Cincinnati, Ohio 45244, to be sent ROBERT GLIMPSE, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did place and cause to be placed in an authorized depository for mail matter a letter addressed to American Oil Company, P.O. Box 5077, Atlanta, Georgia 30302, to be sent by the United States Post Office Department and Postal Service and did knowingly cause said letter to be delivered by mail according to the direction thereon.

All in violation of Sections 134 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT SIX

1. The Grand Jury realleges all the allegations contained in Paragraphs 1 through 11 inclusive of Count One of this indictment and further alleges:

2. On or about January 20, 1971, in the Southern District of Florida, the defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., and LANCE LAWRENCE COOL, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did cause to be placed in an authorized depository for mail matter a letter addressed to Empire Diamond Corporation, Empire State Building, 350 Fifth Avenue, New York, N.Y. 10001 to be sent by the United States Post Office Department and Postal Service and did knowingly cause said letter to be delivered by mail according to the direction thereon.

All in violation of Sections 1341 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT SEVEN

1. The Grand Jury realleges all of the allegations contained in Paragraphs 1 through 11, inclusive, of Count One of this Indictment, and further alleges:

2. On or about July 19, 1971, defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, and BEN NONKIN, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, did cause to be placed in an authorized depository for mail matter a letter from Atlas Tool and Manufacturing Company, 5151 Natural Bridge, St. Louis, Mo., addressed to PORTER HARDWARE, 5908 N.W. 2nd Ave., Miami, Florida, to be sent and delivered by the United States Post Office Department and Postal Service, and did knowingly cause said letter to be delivered by mail according to the directions thereon.

All in violation of Sections 1341 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT EIGHT

1. The Grand Jury realleges all of the allegations contained in Paragraphs 1 through 11, inclusive of Count One of this Indictment, and further alleges:

2. On or about July 27, 1971, defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, and ANGELO JOSEPH CIULLA, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, knowingly did cause to be placed in an authorized depository for mail matter a letter addressed to Gulf Oil Corporation, P.O. Box 7245, Station C, Atlanta, Georgia 30309, attn: Petroleum Accounting Center, to be sent and delivered by the United States Post Office De-

partment and Postal Service, and did knowingly cause said letter to be delivered by mail according to the directions thereon.

All in violation of Sections 1341 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT NINE

1. The Grand Jury realleges all of the allegations contained in Paragraphs 1 through 11, inclusive, of Count One, of this Indictment, and further alleges:

2. On or about August 2, 1971, in the Southern District of Florida, defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, and LEROY PRESLEY, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, knowingly did cause to be placed in an authorized depository for mail matter a letter addressed to Gulf Oil Corporation, P.O. Box 7245, Station C, Atlanta, Georgia 30309, attn: Petroleum Accounting Center, to be sent and delivered by the United States Post Office Department and Postal Service and did knowingly cause said letter to be delivered by mail according to the directions thereon.

All in violation of Sections 1341 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT TEN

1. The Grand Jury realleges all of the allegations contained in Paragraphs 1 through 11, inclusive, of Count One of this Indictment, and further alleges:

2. That on or about August 14, 1971, in the Southern District of Florida, the defendant ANGELO JOSEPH CIULLA, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, knowingly did cause to be placed in an authorized depository for mail matter a letter addressed to Humble Oil and Refining Company, Bala Cynwyd, Pennsylvania, to be sent and delivered by the United States Post Office Department and Postal Service and did knowingly cause said letter to be delivered by mail according to the directions thereon.

All in violation of Sections 1341 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT ELEVEN

1. The Grand Jury realleges all the allegations contained in Paragraphs 1 through 11, inclusive, of Count One of this Indictment, and further alleges:

2. On or about July 6, 1971, in the Southern District of Florida, defendant LANCE LAWRENCE COOL,

for the purpose of conducting, promoting and carrying on by means of the United States Post Office Department and Postal Service the aforesaid scheme, did use and assume a fictitious, false and assumed name, that is, the name "ROBERT HAVEN".

All in violation of Section 1342, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT TWELVE

1. The Grand Jury realleges all the allegations contained in Paragraphs 1 through 11, inclusive of Count One of this Indictment, and further alleges:

2. On or about June 28, 1971, in the Southern District of Florida, the defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, and THOMAS H. VARCO, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did transmit and cause to be transmitted signs, signals and sounds in interstate commerce by means of a wire communication, that is, a telephone conversation between Miami, Florida, and Brunswick, Georgia.

All in violation of Sections 1343 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT THIRTEEN

1. The Grand Jury realleges all the allegations contained in Paragraphs 1 through 11, inclusive, of Count One of this Indictment, and further charges:

2. On or about June 29, 1971, in the Southern District of Florida, the defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO JOSEPH CIULLA, and BEN NONKIN, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did transmit and cause to be transmitted signs, signals and sounds in interstate commerce by means of a wire communication, that is, a telephone conversation between Miami, Florida, and Chicago, Illinois.

All in violation of Sections 1343 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT FOURTEEN

1. The Grand Jury realleges all the allegations contained in Paragraphs 1 through 11, inclusive, of Count One of this Indictment, and further alleges:

2. On or about July 6, 1971, in the Southern District of Florida, the defendants JOSEPH G. SCATA, WILLIAM E. OWEN, JR., LANCE LAWRENCE COOL, ANGELO

JOSEPH CIULLA, and JULIUS L. GROSSMAN, for the purpose of executing the aforesaid scheme and artifice, and attempting to do so, did transmit and cause to be transmitted signs, signals and sounds in interstate commerce by means of a wire communications, that is, a telephone conversation between Miami, Florida, and Cleveland, Ohio.

All in violation of Sections 1343 and 2, Title 18, United States Code.

THE GRAND JURY FURTHER CHARGES:

COUNT FIFTEEN

1. From on or about May 1, 1971 to August 23, 1971, in the Southern District of Florida, and elsewhere, AGOSTINO AMATO, JOSEPH G. SCATA, WILLIAM EUGENE OWEN, JR., LANCE LAWRENCE COOL, THOMAS H. VARCO, BEN NONKIN, JULIUS L. GROSSMAN, ANGELO JOSEPH CIULLA, NILO DABAG, LEROY PRESLEY, and FREDERICK MORSE ALLEN, defendants herein, did willfully and knowingly conspire, combine, confederate and agree together and with each other, and with other persons to the Grand Jury unknown to commit offenses against the United States, to wit,

(a) To knowingly use the United States mails and cause said mails to be used for the purpose of executing a scheme and artifice to defraud and for obtaining money and property, by means of false and fraudulent pretenses, representations and promises, from suppliers of merchandise in the manner and means set forth in Counts 1 through 14, inclusive, of this Indictment, the allegations

of which are hereby realleged and incorporated herein by reference; all in violation of Section 1341, Title 18, United States Code.

(b) To use and assume, and request to be addressed by fictitious, false and assumed titles and names other than their own proper names for the purpose of conducting, promoting and carrying on by means of the United States Post Office Department and the Postal Service the aforesaid scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises; all in violation of Section 1342, Title 18, United States Code.

(c) To transmit and cause to be transmitted writings, signs, signals and sounds in interstate commerce by means of wire communications, for the purpose of executing the aforesaid scheme and artifice; all in violation of Section 1343, Title 18, United States Code.

2. All of the acts of each of the said defendants set forth in Counts 1 through 14, inclusive, of this Indictment, are hereby realleged and incorporated herein by reference and designated as overt acts done in furtherance of and to effect the objects of said conspiracy. In addition thereto and in furtherance of the said conspiracy and to accomplish the objects and purposes thereof, defendants did commit, among other acts the following:

## OVERT ACTS

1. On or about May 26, 1971, the defendants JOSEPH G. SCATA and WILLIAM E. OWEN, JR. did meet Francis J. Kesting at PORTER HARDWARE, 5908 N.W. 2nd Avenue, Miami, Florida.

2. On or about June 4, 1971, the defendant WILLIAM E. OWEN, JR. made a telephone call to Kansas City, Missouri.

3. On or about June 24, 1971, the defendants AGOSTINO AMATO and JOSEPH G. SCATA met at PORTER HARDWARE, and took and carried away merchandise from said premises.

4. On or about June 24, 1971, the defendant NILO DABAG met with the defendant JOSEPH G. SCATA at PORTER HARDWARE, after which NILO DABAG took merchandise from said premises.

5. On or about June 24, 1971, the defendants JOSEPH G. SCATA, LANCE LAWRENCE COOL and ANGELO JOSEPH CIULLA met at PORTER HARDWARE.

6. On or about June 25, 1971, the defendants THOMAS H. VARCO and JOSEPH G. SCATA met at PORTER HARDWARE, where THOMAS H. VARCO obtained a quantity of paint which was placed in a truck bearing the name Varco Wood Products.

7. On or about June 25, 1971, the defendants LANCE LAWRENCE COOL and ANGELO JOSEPH CIULLA, took a refrigerator from PORTER HARDWARE and delivered it to the Famous Door Lounge, 2151 N.W. 119th Street, Miami, Florida.

8. On or about June 25, 1971, the defendant FREDERICK MORSE ALLEN, arrived in an automobile

at PORTER HARDWARE and took merchandise from PORTER HARDWARE and placed it in said automobile.

9. On or about June 29, 1971, the defendant JULIUS L. GROSSMAN, met with the defendant WILLIAM E. OWEN, JR. at PORTER HARDWARE, and JULIUS L. GROSSMAN took merchandise from said premises which was placed in the truck in which GROSSMAN had arrived.

10. On or about June 30, 1971, the defendant WILLIAM E. OWEN, JR. and the defendant BEN NONKIN met in front of Discount Manufacturer's Outlet, 310 N.W. 25th Street, Miami, Florida.

11. On or about July 9, 1971, the defendant BEN NONKIN received at Discount Manufacturer's Outlet, 310 N.W. 25th Street, Miami, Florida, a quantity of merchandise from PORTER HARDWARE.

12. On or about July 12, 1971, the defendants LANCE LAWRENCE COOL and ANGELO JOSEPH CIULLA attended a housewares show in Chicago, Illinois.

13. On or about July 29, 1971, the defendants WILLIAM E. OWEN, JR. and LEROY PRESLEY, signed a business property lease agreement for a warehouse located at 6708 N.E. 4th Avenue, Miami, Florida.

14. On or about August 6, 1971, the defendants THOMAS H. VARCO and NILO DABAG received a quantity of wooden door which had been ordered and obtained through PORTER HARDWARE.

15. On or about August 6, 1971, the defendants THOMAS H. VARCO and JOSEPH G. SCATA met at Varco Wood Products, 3650 N.W. 50th Street, Miami, Florida.

16. On or about August 6, 1971, the defendant FREDERICK MORSE ALLEN took merchandise from PORTER HARDWARE and put it in the automobile in which he had drove to PORTER HARDWARE.

All in violation of Section 371, Title 18, United States Code.

A TRUE BILL

_____
FOREMAN

TRIAL ATTORNEY
U.S. DEPARTMENT OF JUSTICE

By:_____

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# In the Supreme Court of the United States

OCTOBER TERM, 1974

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Nos. 73-1946 and 73-6978

JOSEPH G. SCATA AND WILLIAM E. OWEN, Jr.,
PETITIONERS

*v.*

UNITED STATES OF AMERICA

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*ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A, pp. 1-21) is reported at 492 F. 2d 1100.

### JURISDICTION

The judgment of the court of appeals was entered on April 19, 1974. Petitions for rehearing were denied on May 28, 1974 (Pet. App. B, pp. 22-23). The petition for a writ of certiorari in No. 73-1946 was filed on June 27, 1974. The petition for a writ of certiorari in No. 73-6978 was filed on June 28, 1974 and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the evidence against petitioner Scata was sufficient to sustain his conviction of conspiracy and of substantive violations of the wire and mail fraud statutes on a theory of aiding and abetting.

2. Whether the indictment against petitioner Owen should have been dismissed because persons between the ages of 21 and 25 and persons of Latin American descent were unlawfully excluded from the grand jury.

3. Whether petitioner Owen's cooperation with the government was the fruit of an unconstitutional search and seizure and whether the government reneged on its agreement to recommend probation in return for Owen's cooperation.

## STATEMENT

After a jury trial in the United States District Court for the Southern District of Florida, petitioners were convicted of conspiracy and several counts of wire and mail fraud in violation of 18 U.S.C. 371, 1341, 1343, and 2. Specifically, petitioner Scata was convicted of conspiracy, five counts of mail fraud and one count of wire fraud; petitioner Owen was convicted of conspiracy, four counts of mail fraud and one count of wire fraud. Scata was sentenced to concurrent four-year prison terms on each of the six substantive charges and to a consecutive two-year term of imprisonment on the conspiracy count. Petitioner Owen was sentenced to concurrent four-year prison terms on each of the five substantive counts and to a consecutive one-year term of imprisonment

on the conspiracy count.[1] The court of appeals reversed as to one of petitioner Scata's substantive convictions[2] and affirmed in all other respects (Pet. App. A, p. 21).[3]

1. The evidence at trial showed a scheme by petitioners and others to defraud persons who sold merchandise to a hardware store which petitioner Owen had purchased. It further demonstrated that petitioners made use of the mails and wire communications in the furtherance of their scheme.

On May 26, 1971, Francis Kesting sold his small Miami, Florida, hardware store, Porter Hardware, Inc., to petitioner William Owen for $5,000. Owen, who was accompanied by petitioner Joseph Scata at the time, had answered a newspaper advertisement listing the store for sale. He gave Kesting $1,000 in cash, a check for $500, and three promissory notes in the total amount of $3,500 (Tr. 306–313, 1485).

Upon taking control of Porter Hardware, Owen proceeded to place orders for substantial quantities of merchandise which were to be delivered to the store on credit. Some of this merchandise was ordered under the fictitious name of "Robert Haven." Numerous sellers supplied goods to Porter's in reliance upon its credit reputation and favorable credit rating previously established by Kesting (Tr. 153–159, 171–175, 183–187, 202–207, 321–325, 338–345, 378–379, 382–

[1] Co-defendants Julius Grossman and Frederick Allen were both given suspended sentences, placed on probation, and fined.

[2] The court concluded that reversal of one of the mail fraud counts was required by this Court's recent decision in *United States* v. *Maze*, 414 U.S. 395.

[3] "Pet. App." refers to petitioner Scata's appendix.

388, 484–489, 501–505, 510–515, 534–539, 551–544, 584–587, 592–593, 603–605, 615–623, 630–631, 1016–1021, 1024, 1233). The merchandise delivered to Porter Hardware was not used to replenish or increase the store's stock of goods, which in fact declined from late May 1971 to the date of the store's closing, August 6, 1971 (Tr. 234–236, 313–316, 1231–1232). Rather, goods delivered to Porter Hardware were given away, resold at less than cost, or stored for later distribution at one of several warehouses operated by Porter's in the city of Miami (Tr. 255–257, 1155, 1160, 1163, 1459, 1486). Only a small amount of cash was kept in the store's cash register, and very little business was done with walk-in customers inside the store (Tr. 233, 1355).

At least $35,000 worth of merchandise delivered to Porter Hardware on credit was never paid for (Tr. 156, 164, 182–183, 220–221, 327, 335, 343, 378–379, 388, 487–488, 505–506, 513, 534, 587–590, 630). Petitioner Owen put off creditors by promising that payment would soon be received, by claiming that it was not yet due and, on at least one occasion, by threatening the creditor (Tr. 159–164, 325–326, 486–487, 505–507, 513–514, 587–590, 620–622, 1022–1023, 1237–1239). Orders were placed with suppliers until Porter Hardware's credit with each was exhausted; the bills then were not paid. Employees of Porter Hardware did not receive their full wages; the former owner of the business was not paid in full; and a check written to cover the cost of renting a warehouse for Porter Hardware failed to clear because of insufficient funds in the bank (Tr. 143–144, 227–228, 313, 316–320, 486,

539–540, 554–565, 620, 875, 1024–1025). Petitioner Owen admitted to law enforcement officials in August of 1971 that he had ordered merchandise on credit for Porter Hardware and then resold it to various persons for one-half its wholesale cost (Tr. 1485–1486).

The evidence indicated that petitioner Scata participated with Owen in directing the affairs of Porter Hardware. Scata authorized the purchase on credit of four new automobile tires, which he then gave to one Elizabeth Cindele (Tr. 451–457, 807–808, 1446–1447). He paid personal debts with Porter Hardware's merchandise, arranged for the sale of some of the goods, and accepted substantial quantities of merchandise himself (Tr. 298, 394–401, 737–741). When one Snider, an employee of Porter Hardware was first introduced to him, Scata asked Owen if Snider could be trusted as an employee (Tr. 1163).

Through Porter Hardware, petitioners and their co-defendants received quantities of goods for their personal use or for resale. Petitioner Scata received brushes, garden hoses, tools, cement, minibikes, an automobile battery, wood for himself and a neighbor, a davit for his boat, a unit for cutting the thread on screws, gasoline for his car, carpeting for his house, two coats of paint for his house, and other merchandise (Tr. 263–275, 739–746, 810, 924, 962–969, 1168–1174, 1446). Co-defendant Grossman obtained a large number of garbage cans, 100 Polaroid cameras, and more than a truckload of other merchandise (Tr. 264, 273, 756–772, 1206, 1455–1456, 1469). Co-defendant Allen received rope, plastic garbage cans, minibikes, paint, portable sinks, cutlery, battery cables,

and other items (Tr. 772–781, 1177–1187, 1223, 1452, 1469, 1476–1481). Petitioner Owen also received merchandise (Tr. 1232–1233).

2. On August 6, 1971, on the basis of information supplied by an informant, police officers stopped an automobile driven by Owen and seized a gun found in a paper bag on the front seat of the vehicle. Owen was then arrested and charged as a convicted felon with possession of a gun in violation of 18 U.S.C. App. 1202(a). (Tr. 211–227, 241–247). After being taken to the police station and being booked, petitioner spoke with Postal Inspector Conner who told Owen that he was suspected of mail fraud and that Conner would like to discuss the matter with petitioner at a later time. Four days later, after his release from custody, Owen met Conner at Conner's office, executed a written waiver of his rights and discussed with Conner the possibility of Owen's cooperation. Petitioner Owen then began cooperating with the government and consented to a search of Porter Hardware and access to the store's records.

On August 12, 1971, Owen appeared before a magistrate on the gun charge, at which time the government attorney, Mr. Quinn, advised the court that an indictment was being obtained in a mail fraud case. Mr. Quinn advised Owen's attorney that petitioner had agreed to cooperate in the mail fraud case and that in return for Owen's cooperation and testimony either Owen would not be indicted or, if he were indicted and convicted, the government would recommend probation (Pet. App. A, p. 11). Petitioner indi-

cated his approval of the agreement. The gun charge against petitioner subsequently was dismissed.

Sometime between September 12 and October 9, 1972, Owen's new attorney, Mr. Tifford, spoke with Quinn. Subsequently, Tifford informed the court that Quinn had told him that the government would apprise the court of Owen's cooperation, but would not recommend probation (Tr. 675–676, 695–696). Quinn advised the court that he had informed Tifford that the government would make known to the court Owen's complete cooperation and would seek from the court "whatever consideration that it could possible [sic] give" on Owen's behalf. Quinn simply could not recall, however, whether he specifically mentioned in this respect a recommendation of probation. He recalled only that he had pointed out to Mr. Tifford that probation might be difficult to secure in view of Owen's reputation and background (Tr. 677–679). However, on October 9, 1972, well before the beginning of the trial in this case, the district court was apprised of the government's position that if Owen testified at trial the government would recommend probation (Tr. 675–676, 680). Despite the fact that this offer remained open throughout trial, Owen did not testify for the government.

## ARGUMENT

1. Petitioner Scata contends that the evidence against him was insufficient to sustain his conviction because it showed merely his occasional presence at Porter Hardware, rather than any active participation in the conspiracy. He also argues that the jury

must have relied upon the same insufficient evidence to convict him of the substantive counts.

We have been advised that petitioner Scata still has not surrendered himself to the proper authorities following the issuance of the court of appeals' mandate and that he has not been arrested pursuant to the bench warrant which subsequently was issued. Because of his present self-imposed fugitivity, further review of his conviction in this Court is not available. See *Molinaro* v. *New Jersey*, 396 U.S. 365.

In any event, petitioner Scata's contention that the evidence was insufficient to support his conviction was thoroughly considered and rejected by the court of appeals, on whose opinion we rely (Pet. App. A, pp. 5–8). While the court acknowledged that mere presence at the scene of a crime or mere association with those involved is not sufficient to prove participation in a conspiracy, the court found that much more was involved here. The court pointed to petitioner Scata's receipt of a large amount of merchandise for his personal use, his arranging for sales of merchandise and his inquiry into the trustworthiness of one of the employees (Pet. App. A, pp. 6–7). The court concluded (Pet. App. A, p. 7):

> From these incidents, coupled with his frequent presence at the store, the jury might reasonably infer that Scata was more than merely a bystander at Porter Hardware; that, in fact, he was directly involved in the operation if not the management of the enterprise; and that he was aware of and aided in the conspiracy to defraud suppliers by the use of the mails and wire communication.

Petitioner Scata also argues that the jury must have relied on the same evidence to convict him of the substantive counts and that such reliance was improper. However, if there was evidence beyond mere presence for the jury to consider on the conspiracy count, it was permissible for the jury to consider this same evidence as it related to the substantive counts. It is settled that neither a conviction nor an acquittal on a conspiracy charge bars conviction on the substantive counts, even as an aider and abettor. *Pereira* v. *United States*, 347 U.S. 1, 11; *Pinkerton* v. *United States*, 328 U.S. 640, 643–644. The fact that some of the evidence to support the substantive convictions was also used to support the conspiracy charge is immaterial. *Nye & Nissen* v. *United States*, 336 U.S. 613, 619; *United States* v. *McGowan*, 423 F. 2d 413, 415–417 (C.A. 4). As the court of appeals said in this case (Pet. App. A, pp. 7–8):

> The jury could have inferred from the evidence that there was a conspiracy to defraud suppliers of merchandise, and that Scata was a member of the conspiracy. It follows that the jury could find Scata liable as an aider and abettor in the various substantive offenses. The substantive offenses charged in the indictment result from transactions between Porter Hardware and various suppliers. The individual transactions were merely a part of the general plan. If Scata participated to the extent that he conspired with others in a scheme designed to defraud suppliers, then the jury could properly find that he expected and encouraged the individual communications which constitute the substantive offenses. This would be suf-

ficient participation to make Scata an aider and abettor under substantive Counts 2, 4, 5, 7 and 12.

2. Petitioner Owen contends that the indictment should have been dismissed because the grand jury was constituted unlawfully in violation of 28 U.S.C. 1865. He asserts that in a community which is 25 percent Spanish-speaking and is comprised of a large number of young people, the failure of the clerk of the court to replenish the jury list or pool since July 1968 resulted in there being an insufficent number of persons on the grand jury of Latin American descent and between the ages of 21 and 25.

The court of appeals found petitioner's contention identical to claims raised and rejected in a number of cases involving the same plan for jury selection as that involved in the instant case (Pet. App. A, pp. 18–19).[4] In those cases, the court had concluded that the Jury Plan of the Southern District of Florida conformed to the requirements of 28 U.S.C. 1863 and 1864 and that the plan was constitutional. Insofar as the replenishment of the jury list or pool is required by the statutory scheme, the court concluded that it could take judicial notice of the passage of time since the pool had been replenished and could then calculate the effect of a particular lapse of time in temporarily excluding certain qualified jurors from serv-

[4] Those cases are *United States* v. *Perry*, 480 F. 2d 147 (C.A. 5); *United States* v. *Palacio*, 477 F. 2d 560 (C.A. 5); *United States* v. *Gooding*, 473 F. 2d 425 (C.A. 5), certiorari denied, 412 U.S. 928; *United States* v. *Blair*, 470 F. 2d 331 (C.A. 5), certiorari denied, 411 U.S. 908; *United States* v. *Pentado*, 463 F. 2d 355 (C.A. 5), certiorari denied *sub nom. Ochoa* v. *United States*, 409 U.S. 1079.

ice on the grand or petit jury; the constitutional acceptability of a particular interval of time involved in emptying and refilling the jury wheel could then be determined as a matter of law. *United States* v. *Gooding*, 473 F. 2d 425, 429–430 (C.A. 5); *United States* v. *Perry*, 480 F. 2d 147 (C.A. 5).

As this Court recently said in response to an analogous claim in *Hamling* v. *United States*, No. 73–507, decided June 24, 1974, slip op. p. 48:

> [S]ome play in the joints of the jury selection process is necessary in order to accommodate the practical problems of judicial administration. Congress could reasonably adopt procedures which, while designed to assure that "an impartial jury is drawn from a cross-section of the community," at the same time take into account practical problems in judicial administration. Unless we were to require the daily refilling of the jury wheel, Congress may necessarily conclude that some periodic delay in updating the wheel is reasonable to permit the orderly administration of justice. Invariably of course, as time goes on, the jury wheel will be more and more out of date, especially near the end of the statutorily prescribed time period for updating the wheel. But if the jury wheel is not discriminatory when completely updated at the time of each refilling, a prohibited "purposeful discrimination" does not arise near the end of the period simply because the young and other persons have belatedly become eligible for jury service by becoming registered voters. Since petitioners failed to establish a discriminatory exclusion of the young from their jury, the District Court properly exercised its discre-

> tion in refusing to grant petitioners' motion for a continuance. [Citations and footnotes omitted.]

In the absence of any showing that the conclusions reached in the earlier cases about the jury selection plan of the Southern District of Florida were erroneous, and there having been no attempt to establish in this case the degree of underrepresentation of any particular class, the court of appeals properly relied upon its prior decisions to affirm the conclusion of the district court that no hearing was required and that the time lag asserted was within the permissible limits of the statute and the due process requirements of the Constitution.

3. Petitioner Owen contends that the warrantless search of his automobile and the seizure of the gun were in violation of his Fourth Amendment rights and that this unlawful search, which led to his arrest on the gun charge, was used to coerce his cooperation. Moreover, he asserts that the government reneged on its agreement to recommend probation in return for his full cooperation.

Relying upon this Court's opinion in *Wong Sun* v. *United States*, 371 U.S. 471, the court of appeals properly concluded that "even assuming that the arrest [of Owen] was unlawful, any taint arising from the arrest had dissipated by the time Owen agreed to cooperate with the authorities in the mail fraud case" (Pet. App. A, p. 12). The court pointed out that no deal was offered Owen while he was in custody on the gun charge, that no one interrogated him at that time, that Owen voluntarily returned four days later to

discuss with Conner his cooperation in the case, that he executed a written waiver of his rights, and that there were no oppressive or custodial circumstances at the time that Owen and Conner discussed an agreement (Pet. App. A, p. 14).

The court found equally without merit petitioner Owen's final contention that the government reneged on its part of the agreement with Owen. While counsel for the government could not recall whether at the time of the original negotiations he had promised to recommend probation in exchange for Owen's cooperation, he subsequently apprised the district court and defense counsel that if Owen did testify at trial, the government would recommend probation (Tr. 675–676, 680). Despite the fact that this offer remained open throughout the trial, Owen declined to testify. Accordingly, the court of appeals correctly pointed to the fact that at trial petitioner and not the government backed out of the agreement (Pet. App. A, p. 15).[5]

## CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petitions for writs of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

OCTOBER 1974.

[5] Petitioner Owen's contention that part of the agreement involved a government promise not to indict him for any similar crimes is nowhere supported in the record and is not properly before this Court since it was not raised in the court below. *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147.

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